78-1792

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In the Supreme Court of the United States

October Term, 1978

FRED T. WORNOCK and ROBERT SNOW,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 4, 1979, affirming their convictions in the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The petitioners were convicted of conspiring to import marijuana. Their motions for judgment of acquittal and for a new trial were denied by the trial court.

The petitioners took a joint appeal raising a single issue: sufficiency of the evidence. The appeal was brought by an agreed statement of facts pursuant to Rule 10(d) of the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Seventh Circuit in a written opinion held the evidence sufficient.

The issues that petitioners raise herein relate entirely to the manner in which the Court of Appeals affirmed the convictions. In particular, this petition questions the reliance by the Court of Appeals on facts found by judicial notice, on testimony not contained in the agreed statement of facts, and on testimony which was admitted in the trial court for only a limited purpose. Appellants' objections to the manner in which the Court of Appeals affirmed their convictions were raised by a joint petition for rehearing. The petition for rehearing was denied by a summary order and without opinion.

Accordingly, there are no opinions below which discuss any of the issues raised by this petition. However, the opinion of the United States Court of Appeals for the Seventh Circuit affirming the petitioners' convictions, which has not yet been reported, is set out in full in the appendix beginning at App. 1, *infra*. The order of the Court of Appeals denying the petition for rehearing is also set out in the appendix immediately following the opinion.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 4, 1979. Petitioners duly filed a petition for rehearing. The petition for rehearing was denied by an order entered on April 30, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a Court of Appeals may base a determination that the evidence is sufficient to support a criminal conviction upon judicial notice of a fact critical to its decision without giving prior notice or opportunity to rebut the fact judicially noticed.

2. Whether a Court of Appeals, considering the sufficiency of the evidence to support a criminal conviction, may consider testimony admitted at trial for only a limited purpose as evidence of guilt beyond the limitations placed on its admittance in the trial court.

3. Whether a Court of Appeals, considering an appeal brought upon an agreed statement of facts pursuant to Rule 10(d), Fed. R. App. P., may rely on testimony outside of the agreed statement without prior notice to the parties.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ., and to have the Assistance of Counsel for his defence."

Rule 10(d), Federal Rules of Appellate Procedure:

> "In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign

a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11."

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

On August 26, 1977, the petitioners, along with a third defendant, Terry Kaye, were indicted by a grand jury in the Northern District of Illinois on one count of violating 21 U.S.C. §963 by conspiring to import marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. §952(a).

A jury trial commenced before the Honorable John F. Grady, District Judge, on February 14, 1978. Petitioners moved for a judgment of acquittal pursuant to Rule 29, Fed. R. Crim. P., and this motion was denied on February 16, 1978. Judgments of guilty as to each petitioner were entered following the return of the jury's guilty verdict on February 17, 1978.

Motions for a new trial and judgment of acquittal were denied on March 13, 1978. Petitioner Wornock was sentenced on March 29, 1978, to a term of two years' imprisonment followed by a special parole term of an additional two years. Petitioner Snow was sentenced to a term of one year and one day imprisonment followed by a two-year special parole term.

II. PROCEEDINGS IN THE COURT OF APPEALS

A. Record on Appeal

Petitioners appealed from the judgments of conviction to the United States Court of Appeals for the Seventh Circuit. They raised a single issue: whether the evidence was sufficient to support their convictions. In lieu of a transcript of trial testimony, they submitted an agreed statement of the case adopted by the petitioners and the government and approved by the trial judge pursuant to Rule 10(d), Fed. R. App. P. The full text of the agreed statement is as follows:

> In March and April, 1976, Fred Wornock and others agreed to act in concert to smuggle marijuana into the United States from Colombia. Other parties to this agreement included Terry Kaye and Robert Snow.
>
> Each of these three persons, Wornock, Kaye and Snow, made statements and performed acts which were in furtherance of the agreement and during its pendency. Some of these statements and acts were in the Northern District of Illinois.
>
> During March and April, 1976, Raymond Justinic was a Special Agent of the Drug Enforcement Administration; Howard Perrin was a pilot for United Airlines and a friend of Terry Kaye. During this period, Justinic and Perrin pretended to join the Wornock-Kaye-Snow group and made statements and performed acts which appeared to be in furtherance of the importation agreement.
>
> Justinic pretended to agree to be the pilot who would ferry the marijuana from Colombia to the United States. He was offered in excess of $100,000 for each trip; an airport manager in Illinois was offered $25,000 for each landing if he could ensure that the field would be safe; Justinic was given $6,000 as an

advance payment of his expenses in connection with surveying the airstrip in Colombia. Wornock said that he was running the smuggling operation and had been involved in smuggling for the previous nine years. It was agreed that after Justinic completed the contemplated deliveries, he could be included in a new group comprised of Snow and Wornock which would continue smuggling activities. It was said that high Colombian officials would provide protection when the aircraft was being loaded.

All of the parties discussed the marijuana which was to be imported; no marijuana was imported; none was in evidence.

Both the Second and Third Editions of Webster's New International Dictionary (Defendant Wornock's Exhibits 1 and 2) are recognized and learned treatises in lexicography and the meaning of words. Each of these treatises contains two definitions of the word "marijuana." In each, the first definition is the plant *Nicotiana Glauca* and the second is the plant *Cannabis Sativa L.*

B. Nature of Petitioners' Argument on Appeal

Briefly summarized, petitioners in their appeal presented the following argument challenging the sufficiency of the evidence: The Controlled Substances Act makes it unlawful to smuggle the *Cannabis* variety of marijuana but not the *Nicotiana Glauca* variety. Petitioners argued that the government was required to prove that the *Cannabis form* of marijuana was the object of the importation agreement; that the government proved only that they described the object of their agreement by use of an ambiguous term; and that the government did not offer proof of any circumstances which would permit a jury to conclude that the appellants meant *Cannabis* rather than *Nicotiana Glauca* when they spoke of importing "marijuana."

C. Nature of the Government's Argument on Appeal

The government argued in the Court of Appeals that it was not required to prove that petitioners meant *Cannabis* when they spoke of "marijuana."

D. Decision of the Court of Appeals

On the issue argued by the government, the government lost. The Court of Appeals ruled that the government was required to prove that the object of the importation agreement was the *Cannabis* variety of marijuana.

On the important issue, whether the evidence was sufficient, petitioners lost. The Court of Appeals ruled that the evidence was sufficient to prove beyond a reasonable doubt that the object of the importation agreement was the *Cannabis* variety of marijuana.

In reaching this conclusion, the Court admittedly relied on facts outside the record. In particular, the Court of Appeals relied on a fact which it described as a matter of "everyday knowledge," *i.e.* that "our society customarily uses the term 'marijuana' to refer to cannabis, not wild tobacco" (slip op. at 5). The Court of Appeals also relied on the definition of marijuana contained in Webster's New World Dictionary of the American Language, Second College Edition (1963), opining that "it is unlikely that the wild tobacco definition would be known to anyone who had not resorted to an unabridged dictionary" (slip op. at 5).

In addition, the Court of Appeals referred to testimony which was not part of the agreed statement. The reference, contained in a footnote (slip op. at 6n.4), was to the testimony of the witness Perrin that, upon being informed by defendant Kaye of the plan to import marijuana, Perrin called the F.B.I. to report a "drug smuggling business."

The Court of Appeals said this was evidence of Perrin's understanding of the meaning of the term used by the petitioners. The Court noted, in the same footnote, that the testimony concerning Perrin's conversation with the F.B.I. was admitted for only a limited purpose and, in particular, was not admitted for its truth.

Petitioners were given no notice prior to the opinion of the Court of Appeals that the Court would consider facts outside the record or the Perrin testimony. None of this material was argued by the government. Indeed, the government's argument was quite scrupulously limited to the agreed statement. Petitioner's objections to the consideration of the extra-record facts and the Perrin testimony were made in a petition for rehearing. That petition was denied by the Court of Appeals without opinion.

REASONS FOR GRANTING THE WRIT

Petitioners do not seek to have this Court review the sufficiency of the evidence to support their convictions. They recognize that the primary responsibility for reviewing the sufficiency of the evidence rests with the Court of Appeals. *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). They seek in this Court only an order requiring that the Court of Appeals act fairly in carrying out its responsibility.

The opinion of the Court of Appeals specifically holds that proof that petitioners used the term marijuana to describe the object of their importation business was sufficient by itself to permit a jury to conclude that they meant to import *Cannabis*. The opinion seeks to give concrete meaning to an ambiguous term by "facts outside the record, that is, a general body of knowledge which both judge and jury carry into the courtroom" (slip op. at 4). The opinion concludes that part of the common sense and everyday knowledge possessed by judges and jurors is the "fact" that the term "marijuana" is customarily used to refer to *Cannabis* rather than to *Nicotiana Glauca*. The opinion goes on to postulate that only persons who read unabridged dictionaries know that marijuana means wild tobacco.

The Court of Appeals relied in part on the decision in *United States* v. *Prochaska*, 222 F.2d 1 (7th Cir.), *cert. denied*, 350 U.S. 836 (1955). That case was concerned with whether the words used in a letter containing an extortionate demand for money constituted a threat to do physical harm. To solve this problem, the Court in *Prochaska* looked to the objective meaning of the words used as measured by the common experience of society.

The reliance on *Prochaska* and the reference to the customary use of the term "marijuana" is misplaced. Unlike *Prochaska,* this case depends on the petitioners' subjective meaning of the term "marijuana," not its common or objective meaning. Paraphrasing Mr. Justice Frankfurter's opinion in *Garner* v. *Louisiana,* 368 U.S. 157, 174 (1961), these particular petitioners are being sent to jail for the use of a term alleged to have a particular meaning in a particular context. Proof of the common meaning of the term begs the question. Conviction requires proof they employed a particular meaning, *i.e. Cannabis.*

Determining the specific or subjective meaning of a word with multiple definitions is simply impossible outside the context in which the word is used. A person speaking of a "car" may mean an automobile, a railroad coach, a basket below a hot-air balloon or the cage of an elevator. When spoken by a witness in the context of an automobile accident case, the word can clearly be understood to mean automobile. The petitioners did not discuss "marijuana" in the context of a *Cannabis* importation prosecution. The *Cannabis* prosecution was the product of the petitioners' words, not the context in which they were spoken.

The decision of the Court of Appeals goes beyond simple reliance on what it concludes is the common meaning of the term "marijuana." At trial, petitioners argued that it was reasonable to believe they referred to a form of tobacco when they spoke of marijuana. The opinion holds that the jury could, from the mere use of the term alone, find the petitioners' position incredible. The opinion stands for the factual proposition found by judicial notice that it is unreasonable to believe any person would use the term "marijuana" to refer to a type of tobacco.

Petitioners object to judicial notice of such a proposition. The proposition is neither generally known nor readily determinable from sources whose accuracy cannot be reasonably questioned, as required by Rule 201 of the Federal Rules of Evidence. Indeed, petitioners' proof at trial is directly contrary. Dictionaries report the meaning of words as used by people; they do not create those meanings.

Petitioners proved at trial that Webster's New International Dictionary was an authoritative source on the meaning of words. They proved it sufficiently well that the government was willing to incorporate this fact in the agreed statement. In affirming their convictions, the Court of Appeals relied on the definition of "marijuana" found in Webster's New World Dictionary of the American Language, Second College Edition (1963). The unstated premise of the Court of Appeals is that the New World Dictionary is an equal or better source for determining the manner in which people use words. There was no proof of this at trial. If it had arisen, petitioners would have been in a position to disprove it through their expert witness.

The opinion of the Court of Appeals does in this case what the prosecutor sought to do in the United States Supreme Court in *Garner* v. *Louisiana,* 368 U.S. 157 (1961). *Garner* involved state court convictions for breaching the peace. The defendants were black persons who peacefully sat at white-only lunch counters in Louisiana. The issue was whether there was *any* evidence that the defendants' actions could foreseeably have alarmed or disturbed the public. The defendants had not been asked to leave by the store proprietors; there was no evidence that anyone in the vicinity became disturbed; and there was no evidence the defendants engaged in any sort of disturbing conduct other than sitting down quietly.

To fill this gap on appeal, the prosecution argued that the trial court had taken judicial notice of the history of segregated lunch counters in Louisiana and the racial tensions produced by efforts to end them. This Court held that judicial notice could not be used consistent with due process to fill in missing proof of an essential element of the offense. This Court also held that defendants were entitled to notice *in the trial court* of those facts judicially noticed so they could dispute their notoriety and truth and challenge deductions drawn from them. This Court held that an assumption that the trial court had judicially noticed those facts referred to by the prosecutor on appeal would deprive the defendants of due process of law.

The reference of the Court of Appeals to Perrin's testimony in this case raises similar problems. When petitioners argued their case, they and the government were confined to the agreed statement. When the Court of Appeals without prior notice, relied on testimony not contained in the agreed statement, it effectively deprived petitioners of their right to have their counsel argue the illogic and impropriety of using this testimony in the manner employed by the Court of Appeals. *Cf. Herring* v. *New York*, 422 U.S. 853 (1975). Agreed statements both simplify and reduce the cost of the appellate process. If litigants cannot be assured that consideration of a case submitted on an agreed statement will be confined to the agreed statement, they will stop using this device.

As the opinion of the Court of Appeals candidly notes, the Perrin testimony was conditionally admitted to prove something other than the truth of the statement. Offered for its truth, the statement was clearly objectionable. The testimony is nothing more than a prior consistent statement of lay opinion inadmissible under Rules 701 and 801

(d)(1)(B) of the Federal Rules of Evidence. It is fundamentally unfair to treat the testimony on appeal as if it were unconditionally admitted for the truth of the statement. *Cf. Garner* v. *Louisiana*, 368 U.S. 157 (1961).

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

This principle applies whether the fact finding proceeding be criminal, civil or administrative. *See Morrissey* v. *Brewer*, 408 U.S. 471, 488-89 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 269-70 (1970); *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 300-306 (1937).

AN ALLEGORY (IN LIEU OF A CONCLUSION)

"Let us form a conspiracy," said three friends each to the others. When the question arose as to the object of the conspiracy, it was agreed that the conspirators would import roaches.

Many overt acts were committed in furtherance of this conspiracy, but before any roaches were actually imported, the conspirators were arrested and indicted.

The grand jury believed that by "roaches" the conspirators meant *Cannabis*, and so the indictment charged a conspiracy to import that drug.

At trial it was proven that some people use the word "roach" as a slang word for *Cannabis* and others use it as a slang word for cockroach.

The conspirators were convicted, and upon appeal the issue was so simple that everyone agreed to a short state-

ment of facts. Since there was nothing in the agreed statement of facts which permitted the appeals court to affirm the convictions, the judges of that court found some evidence outside the agreed statement and concluded that the conspirators meant *Cannabis* and not insects.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all." L. Carroll, *Through the Looking-Glass*, in COMPLETE WORKS 196 (1939).

In the process of determining what the petitioners meant when they used the term "marijuana," the Constitution, not the Court of Appeals, is the master. The Constitution requires fundamental fairness. The petitioners were denied it. This Court should order it either through its power to determine the meaning of the Constitution or its power to regulate the Courts of Appeals.

REQUEST FOR RELIEF

Petitioners respectfully request that their petition for writ of certiorari be granted, the judgment of the Court of Appeal be vacated, and the case be remanded for a determination of the sufficiency of the evidence without reference to extra-record material.

Respectfully submitted,

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APPENDIX

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-1382, 78-1418, 78-1433

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRED T. WORNOCK, TERRY A. KAYE, and ROBERT SNOW,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-CR-549 — JOHN F. GRADY, *Judge.*

ARGUED DECEMBER 8, 1978—DECIDED APRIL 4, 1979

Before SWYGERT, LAY*, and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* The defendants appeal from their convictions of conspiracy to import a schedule I controlled

* Circuit Judge Donald P. Lay of the Eighth Circuit is sitting by designation.

substance, namely marihuana,[1] in violation of 21 U.S.C. §§ 963 and 952(a). In brief, the evidence showed that the defendants Wornock, Kaye, and Snow entered an agreement to smuggle a substance they referred to as "marijuana" from Colombia to the United States. An undercover DEA agent and a pilot for United Air Lines pretended to join in the scheme. An amount of $100,000 was promised to the undercover agent for each time he ferried marijuana from Colombia to the United States. An Illinoise airport manager was promised $25,000 for each Illinois landing, if he could safeguard the landing from detection.

The defendants Wornock and Snow begin their argument with the candid admission that "[t]he government proved beyond a reasonable doubt that Defendants Wornock and Snow conspired to import marijuana." These defendants, however, argue that their use of the term "marijuana" does not show beyond a reasonable doubt that they conspired to smuggle the controlled substance, "marihuana," described in 21 U.S.C. § 802.[2]

To support this theory, the defendants submitted in evidence at trial the Second and Third Editions of Webster's New International Dictionary. Each dictionary contains two definitions of the word "marijuana." The first definition in each dictionary refers to *nicotiana glauca*, a form of wild tobacco apparently unrelated to any form of cannabis. The second definition refers to the plant *Cannabis sativa*, or the plant which is the source of the drug cannabin. "Marihuana" as defined in 21 U.S.C. § 802 is a controlled substance under the statute. 21 U.S.C. § 812. According to the defendants, the Government offered no proof that the defendants meant cannabis to be the subject of their smuggling conspiracy. No cannabis was submitted in evidence because none was successfully imported. The defendants also argue that the evidence of furtive behavior does not distinguish this conspiracy from a conspiracy to smuggle wild tobacco, which may be subject to excise tax liability, a crime not charged in the indictment.

We agree with the Government that it need not prove that cannabis in fact was imported. *United States* v. *Rose*, No. 78-1331 (7th Cir., December 20, 1978); *United States* v. *Thompson*, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). Thus, the conviction was not improper simply because no cannabis was ever smuggled as the result of the conspiracy. The Government must, however, prove an agreement to violate the law as charged. *United States* v. *Rose*, No. 78-1331 (7th Cir., December 20, 1978); *United States* v. *Bright*, 550 F.2d 249 (5th Cir. 1977); *United States* v. *Baxter*, 492 F.2d 150 (9th Cir.), *cert. denied*, 416 U.S. 940 (1974). Proof that the object of the agreement to import was cannabis, unlawful under 21 U.S.C. § 952(a),[3] was therefore necessary. *See United States* v. *De La Cruz*, 420 F.2d 1093 (7th Cir. 1970).

We hold that the Government proved an agreement to import cannabis in violation of 21 U.S.C. § 952(a). The

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[1] Although 21 U.S.C. § 802 refers specifically to the plant *cannabis sativa L.*, the definition of the controlled substance involved here apparently comprises all species of cannabis containing tetrahydrocannabinol (THC). *E.g.*, *United States* v. *Walton*, 514 F.2d 201 (D.C. Cir. 1975). We also note the spelling "marihuana" in § 802. Because the parties have used the alternate spelling "marijuana," we will ordinarily use that spelling herein.

[2] The defendant Kaye also joins in this argument, but does not concede that he joined in the conspiracy. We discuss the proof of Kaye's participation in the conspiracy *infra*.

[3] Importing *nicotiana glauca* is not unlawful under state statute.

theory of defense argued here on appeal was argued to the jury, and the court instructed the jury as follows:

> *Nicotiana glauca,* also known as wild tobacco, according to the dictionary in evidence, was not classified as a controlled substance by Congress and an agreement to import it is not a violation of the Federal Controlled Substance Act; namely, the Act that I read to you a few moments ago.
>
> According to the dictionaries in evidence, the word marijuana means either: 1) nicotiana glauca, wild tobacco, or 2) cannabis sativa L.
>
> If you have a reasonable doubt that any defendant agreed to import cannabis sativa L., then you must find that defendant not guilty.

The trial court properly let the jury determine whether the possibility that the defendants meant "wild tobacco" bu using the term "marijuana" was sufficient to raise a reasonable doubt about the unlawfulness of the purpose of the agreement under 21 U.S.C. § 952(a). From the jury's verdict it is clear it found the defendants' theory incredible.

The defendants argue that their proof of the ambiguity of the term "marijuana" was unrebutted by any evidence referable only to a cannabis importation conspiracy, and that the jury's verdict was therefore without support in the evidence. The defendants' argument fails to recognize, however, that our system of evidence relies on the use of facts outside the record, that is, a general body of knowledge which both judge and jury carry into the courtroom, without which our judicial system could not operate:

> [E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car", everyone, judge and jury included, furnishes, from non-evidence sources within himself that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum.

Advisory Committee's Note, Fed. R. Evid. 201 (quoting Davis, *A System of Judicial Notice Based on Fairness and Convenience, Perspectives of Law* 69, 73 (1964)). *United States* v. *Ricciardi,* 357 F.2d 91, 95-96 (2d Cir.), *cert. denied,* 384 U.S. 942, 385 U.S. 814 (1966); C. Wright & K. Graham, *Federal Practice & Procedure,* § 5103, at 471-72. *See also United States* v. *Griffin,* 525 F.2d 710 (1st Cir. 1975), *cert. denied,* 424 U.S. 945 (1976); *United States* v. *Prochaska,* 222 F.2d 1 (7th Cir.), *cert. denied,* 350 U.S. 836 (1955). The jury brought to this trial at least an ordinary measure of common sense and everyday knowledge, an example of which is that our society customarily uses the term "marijuana" to refer to cannabis, not wild tobacco. Indeed, we venture that it is safe to say that it is unlikely that the wild tobacco definition would be known to anyone who had not resorted to an unabridged dictionary. Thus Webster's New World Dictionary of the American Language, Second College Edition (1963), for example, defines the word as hemp whose dried leaves are smoked, especially in the form of cigarettes for the psychological and euphoric effects. The use of this term alone is therefore substantial and sufficiently probative evidence to support the jury's finding that the object of the conspiracy was the importa-

tion of cannabis. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).[4]

The defendant Kaye also argues that the evidence that he agreed to commit the crime of importing cannabis is insufficient to support the jury's guilty verdict. Kaye's theory is that he agreed merely to procure a plane and pilot for the scheme, and that he did not join the main smuggling conspiracy.

This contention is without merit. The evidence was more than sufficient for the jury to find that he was a part of the overall conspiracy. He knew the purpose of the conspiracy and the identity of co-conspirators Snow and Wornock. His efforts to assist them in bringing marijuana into the United States from Colombia included approaching Perrin to find a pilot, setting up a meeting between Snow and Perrin and Snow and Justinic, negotiating with Justinic to acquire a plane and crew, offering to pay up to $30,000 per flight to the crew, introducing Justinic to Wornock, and attempting to bribe the manager of the Kankakee Airport to acquire a secured airport for landing the airplane to carry the substantial quantity of marijuana. Indeed, his own admissions demonstrate involvement. Thus, he told Justinic on one occasion that he was part of a smuggling group trying to bring 30,000 pounds of marijuana out of Colombia, and during another conversation he told Justinic that he would have to check with his associate to see if the $56,000 per trip that Justinic was asking for would be approved.

[4] Moreover, the record shows that at least one witness interpreted "marijuana" to mean cannabis, not wild tobacco. Howard Perrin testified that after the defendant Kaye told him of the plan to smuggle "marijuana," his reaction was to call the FBI to inform them of a "drug smuggling business." Although the contents of this conversation were not admitted for their truth, the fact that Perrin made this statement shows his understanding of the meaning of the term used by the defendants.

We agree with the Government that Kaye's agreement with and membership in the charged conspiracy is manifest by both his personal efforts and his concert of action with his co-conspirators to accomplish the goal of the conspiracy. His reliance on *United States* v. *Hysohion*, 448 F.2d 343 (2d Cir. 1971), is misplaced. Unlike Rimbaud in that case, Kaye was no "mere casual facilitator." Kaye's argument that he was ignorant of the details of the scheme does not compel a different result. *United States* v. *Cardi*, 478 F.2d 1362 (7th Cir. 1973), *cert. denied*, 414 U.S. 852 & 1001.

Finally, we conclude that the trial court properly refused the defendant Kaye's multiple conspiracy instruction. The indictment contained one conspiracy count, and the instruction given adequately outlined for the jury the elements of the offense, including the requirement that the defendant be a willing and knowing member of the conspiracy charged. Furthermore, the court recited for the jury Kaye's theory that his participation in the plan was limited to procuring the airplane and did not extend to membership in the smuggling conspiracy. Under these circumstances, the multiple conspiracy instruction merely would have confused the jury. *United States* v. *Abraham*, 541 F.2d 1234 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

For the above reasons, the judgments of the district court are affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. DONALD P. LAY, *Circuit Judge**
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 78-1382 & 78-1433 vs.

FRED T. WORNOCK AND ROBERT SNOW,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois

No. 76-CR-549

John F. Grady, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Fred T. Wornock and Robert Snow, defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Circuit Judge Donald P. Lay of the Eighth Circuit is sitting by designation.